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No. 94-762

In The

Supreme Court of the United States

October Term, 1994

ZELLA HININGER,

Petitioner,

vs.

CAN-AM INDUSTRIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONSE TO QUESTIONS PRESENTED

The two questions presented incorrectly assume that the United States Court of Appeals for the Fifth Circuit failed to follow Texas substantive law. Because the Fifth Circuit correctly interpreted, followed, and applied the current substantive law in Texas, the questions presented are moot.

PARTIES TO THE PROCEEDING

The petitioner is Zella Hininger, Individually and as Personal Representative of the Estate of Thurlo Hininger, a/k/a Ted Hininger, herein referred to as "Hininger." The respondent is Can-Am Industries, Inc. herein referred to as "Can-Am."

Can-Am was the only defendant at trial. On or about August 11, 1992, Hininger settled with Defendants Case Corporation, Case Credit Corporation and Parmer County Implement Company, Inc. and dismissed with prejudice her causes of action against them.

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OPINIONS BELOW

As Hininger has supplied the relevant opinions as appendices to her Petition, all references herein to appendix page numbers are to the appendices to the Petition.

STATEMENT OF THE CASE

A. Procedural Background

In addition to the theories specified in Hininger's Petition, Hininger originally brought the action under a strict liability theory. Strict liability was not submitted to

the jury based upon a ruling by the district judge during the charge conference.

In addressing the choice of law issue raised by Can-Am, the Fifth Circuit determined that a false conflict of law existed because Idaho, Illinois, and Texas law disallow Hininger's recovery. Consequently, the Fifth Circuit determined that it did not need to decide whether the district court erred in applying Texas law to Hininger's tort claims. *Hininger v. Case Corp.*, 23 F.3d 124, 125-26 (5th Cir. 1994). (App. 4).

B. Fact Statement

Hininger is a citizen of Arizona. Can-Am is an Illinois corporation, with its principal place of business in Quincy, Illinois. (App. 16).

Hininger operated a commercial custom grain and seed harvesting business. *Hininger*, 23 F.3d at 125. (App. 2 and 16). In January 1989, Hininger purchased four Case Corporation ("Case") combines from Parmer County Implement Company in Friona, Texas. *Hininger*, 23 F.3d at 125. (App. 2). While working in Idaho in September 1989, Hininger had trouble maintaining air pressure in the drive wheels and Hininger experienced downtime. *Hininger*, 23 F.3d at 125. (App. 2-3). Case replaced the drive wheels in late 1989 and early 1990. Again, while in Idaho in September of 1990, the replacement wheels began to crack around the bolt holes and Hininger experienced downtime. *Hininger*, 23 F.3d at 125. (App. 3). Case again replaced all of the drive wheels. In each instance,

all of the combines had several hundred hours of operation prior to any problems with the drive wheels on the same farm in Idaho.

Hininger incorrectly states on page 3 of her Petition that "Can-Am's negligence in manufacturing the wheels forms the basis of Hininger's negligence claim." Hininger asserted a different basis in requesting that the issue be submitted to the jury. In regard to the replacement wheels and the 1990 damages, Hininger requested submission to the jury based upon an alleged design defect concerning the placement of a small block on the drive wheels. The block and its placement were design changes by Case to avoid the drive wheels being installed incorrectly. Can-Am manufactured the wheels as designed by Case and delivered the wheels to Case in Illinois. *Hininger,* 23 F.3d at 125. (App. 3). Can-Am had no authority to change the design without the consent of Case.

Can-Am also disputes the statement by Hininger on page 3 of the Petition that "[o]nly three replacement wheels could be found in the continental United States." Can-Am had drive wheels available to Case at its plant in Illinois, however, Can-Am was never contacted by Hininger or Case concerning the repair attempts. (App. 29). Moreover, it was stipulated by the parties that neither Hininger nor her husband had any contact with any agent, officer, or employee of Can-Am in connection with the purchase of the four Case combines or the replacement of the wheels.

THE PETITION SHOULD BE DENIED

The Fifth Circuit's opinion in this case reflects the current state of the law in Texas that a plaintiff cannot recover under a negligence theory for economic losses resulting from a defective product. The opinion is consistent with the rulings of the Texas Supreme Court and the majority view.

Dicta in *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977) is the only support cited by Hininger for her position in this case. Because the Fifth Circuit properly applied the substantive law of Texas, it did *not* (1) overrule the substantive law of the forum state's highest court, (2) deprive litigants of a substantive remedy recognized by the forum state, or (3) fail to follow *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

While it was apparent as early as 1978 that Texas would not follow the dicta in *Nobility Homes*, any confusion was laid to rest in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617 (Tex. 1986).

A. The *Erie* Doctrine.

Can-Am does not dispute Hininger's statement of the law under *Erie R.R. Co. v. Tompkins*. Can-Am further agrees that the Texas Supreme Court "has spoken", but disagrees with Hininger as to what has been established as Texas substantive law. The Fifth Circuit correctly interpreted, followed, and applied the current substantive law in Texas that Hininger cannot recover under a negligence

theory for economic loss resulting from a defective product. Further, the Fifth Circuit appropriately determined consistent with the Texas Supreme Court's ruling in *Nobility Homes* that such an action would not lie against a component supplier like Can-Am. *Hininger,* 23 F.3d at 127. (App. 7).

B. This is a products liability case.

Hininger asserts throughout her argument that this is a tort case, however, the facts clearly support the conclusion of the Fifth Circuit that this is a products liability action. *Hininger,* 23 F.3d at 125. (App. 2).

In *Jim Walter Homes,* the Texas Supreme Court recognized that a court must initially determine the type of action that is being brought by looking at the substance of the cause of action and *not* the manner in which it is pleaded. *Jim Walter Homes,* 711 S.W.2d at 617-18.

The Texas Supreme Court adopted the "economic loss" rule in *Nobility Homes* requiring plaintiffs in defective product cases to recover economic losses in contract rather than in tort. In so ruling, the Texas Supreme Court recognized the appropriateness of adopting such a rule because the Uniform Commercial Code was "drafted specifically to govern commercial losses and obviously provides the proper remedies to recover such losses." *Nobility Homes,* 557 S.W.2d at 80.

C. A major distinction in cases cited by Hininger.

The Fifth Circuit's decision in the present case is based upon a finding of a false conflict of law between

the states of Texas, Idaho, and Illinois. *Hininger*, 23 F.3d at 125-26. (App. 4).

One extreme difference between the present case and the cases cited by Hininger is the issue of the applicable law. In both *Stewart & Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635, 638 (11th Cir. 1984) and *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F.Supp. 369, 373 (D. Minn. 1987), it was clear that Texas law governed. Even assuming arguendo that Texas substantive law is as claimed by Hininger, she would still not have a negligence cause of action against Can-Am because either the law of Idaho or Illinois would deny her recovery.

D. *Nobility Homes* statement is dicta.

In affirming the negligence finding in *Nobility Homes* the Texas Supreme Court held that "Nobility does not challenge this separate and independent ground of recovery; consequently, we must also affirm the judgment for Shivers on the negligence point." *Nobility Homes*, 557 S.W.2d at 83. This holding leaves no doubt that the quotation on which Hininger relies is merely dicta. *Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc.*, 24 F.3d 125, 129-30 (10th Cir. 1994); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F.2d 1174, 1177-78 (5th Cir. 1988); William Powers, Jr. & Margaret Niver, *Negligence, Breach of Contract, and the "Economic Loss" Rule*, 23 Tex. Tech L. Rev. 477, 486-87 (1992).

E. No recovery of economic loss under a tort theory.

Hininger's incorrect basic premise as to Texas law fails because the Texas Supreme Court has made it clear that a plaintiff cannot recover for economic loss resulting from a defective product under a tort theory.

Approximately ten months after *Nobility Homes*, the Texas Supreme Court was again faced with this issue of recovery of economic loss resulting from a defective product in *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308 (Tex. 1978). In *Mid Continent*, the court held and clarified that "[i]n transactions between a commercial seller and commercial buyer, when no physical injury has occurred to persons or other property, injury to the defective product itself is an economic loss governed by the Uniform Commercial Code." *Id.* at 313. Eight years later, the Texas Supreme Court reiterated its holding in *Jim Walter Homes. Rocky Mountain Helicopters*, 24 F.3d at 130.

In discussing the availability to plaintiffs of a contract action versus a tort action for the recovery of economic loss resulting from a defective product, the dissenting opinion by Justice Pope in *Mid Continent* even noted the short life of Nobility Homes. *Mid Continent*, 572 S.W.2d at 314.

The stance taken by the Texas Supreme Court and the Fifth Circuit is consistent with the majority view that in a commercial transaction where the only injury claimed is economic loss from the product damaging itself, there is no tort cause of action. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865

(1986). Further, there is no rationale for giving a purchaser greater rights against a component part manufacturer than the purchaser has against the final manufacturer. *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S.Ct. 839, 102 L.Ed.2d 971 (1989); *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 929-30 (5th Cir. 1987), *cert. denied*, 485 U.S. 1007, 108 S.Ct. 1472, 99 L.Ed.2d 701 (1988).

F. Current state of law is clear.

Hininger cites the cases of *Stewart & Stevenson* and *Held v. Mitsubishi* to support the argument that there is a growing conflict among the circuits. It is important to note the dates of these opinions. *Stewart & Stevenson* was decided by the Eleventh Circuit in 1984, three years before the Texas Supreme Court reiterated its holding in *Jim Walter Homes* that economic loss was only recoverable under contract. While *Held v. Mitsubishi* was decided in 1987 or a year after *Jim Walter Homes*, it contained no reference to or analysis of the Texas Supreme Court's decision in *Jim Walter Homes*. The decisions in *Mid Continent* and *Jim Walter Homes* "reflect a change of course in Texas' highest court with regard to economic loss recoverability in negligence actions." *Rocky Mountain Helicopters*, 24 F.3d at 130.

Jim Walter Homes was a suit by Reed seeking damages arising out of the sale and construction of a house brought under the theories of breach of warranty and negligence. The jury found that Jim Walter Homes had breached the warranty of good workmanship in the contract and that it was grossly negligent in supervising

construction of the house and awarded exemplary damages. The Texas Supreme Court was faced with the issue of whether there was an independent tort to support an award of exemplary damages. After determining the substance of the cause of action and *not* the manner in which it was pleaded, the court determined that "[w]hen the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone." (citing *Mid Continent* and *Nobility Homes) Jim Walter Homes,* 711 S.W.2d at 618. The court then recognized that there was no tort that would support the award of exemplary damages to Reed thereby reiterating the law in Texas that a plaintiff has no negligence cause of action to recover for economic losses resulting from a defective product.

While not a products liability case, the Texas Supreme Court in *Southwestern Bell Tel. Co. v. DeLanney,* 809 S.W.2d 493, 494-95 (Tex. 1991) further entrenched its position that where the alleged damages are for economic loss relating to the subject matter of a contract, the action sounds in contract alone.

As is apparent from the current case and the more recent cases of *Arkwright-Boston* and *Rocky Mountain Helicopters* relying upon *Jim Walter Homes,* the **current state of the law** is that Hininger has no negligence cause of action to recover economic losses. Consequently, the questions presented are moot.

CONCLUSION

For the foregoing reasons and authorities, Can-Am respectfully suggests that the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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